Supreme Court, U.S.
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No. 09-1291

In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF

ANDRA CAPACI
Pro se
4149 Bordeaux Dr.
Kenner, LA 70065
Telephone: (504) 443-8888
Facsimile: (504) 464-7711
andra@andracapaci.com
andracapaci888@aol.com

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TRIAL JUDGE'S ABUSE OF DISCRETION

The dismissal of the Petitioner's claims did constitute a violation of the Petitioner's due process rights under the Fourteenth Amendment, because:

1. The trial judge made an unconstitutional ruling that violated the rights of a Louisiana citizen in the Courts of Alabama.

2. The Alabama rules must comply with the Federal Constitutional Rights of due process under the Fourteenth Amendment.

3. The Trial Judge did not preserve Petitioner's JURY TRIAL RIGHT by dismissing her case before the jury could hear the actual merits.

4. The Trial Judge required Petitioner to answer questions EXACTLY the way he wanted which was not supported by Alabama rule.

5. The Court's DISMISSAL OF THE CASE WITH PREJUDICE came **without warning** that such a consequence might follow from Ms. Capaci's "non responsive" answers. His warnings were **constitutionally insufficient** and violated her constitutional due process rights, because:

a. The Court warned her that he would **"terminate her testimony"** (R.506).

b. The Court warned her that **"the trial will end the next time you volunteer an answer that is not requested by the question"**

c. The Court did not warn her or her counsel that he would **sua sponte dismiss the action with prejudice.**

Hodge v. R & R Movers, 716 So.2d 740 (Ala.Civ.App.1998) (dismissal of action for a failure to file certificate of readiness where plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal).

Lack of notice is a relevant factor in assessing the propriety of the court's discretion in dismissing the case.

Since the trial court in sua sponte dismissed with prejudice, he violated the DUE PROCESS rights of Capaci to a hearing on the merits of her claims with a jury, and was an abuse of discretion of the trial court's power under Rule 41(b).

THE RESPONDENT'S ATTORNEY'S FALSE STATEMENTS ABUSED THE INTEGRITY OF THE TRIAL PROCESS

Initially, the Respondent's attorney filed a lawsuit on Capaci, **KNOWINGLY BASED ON A LIE**, that she caused the mold in her leased space by misuse of the air-conditioner. The Respondent and his attorney had proof from their experts and Capaci's experts that the mold was due to a leaky roof and deferred maintenance, but yet, she was sued, in spite of their knowledge to the contrary.

When the Petitioner's attorney was questioning the Respondent on his cross-examination, he asked why he sued Capaci (a 9 year tenant) in the first place. The Respondent's attorney jumped up and stopped Capaci's lawyer who knew she was sued based on a lie. The Respondent admitted knowing the mold was due to a leaky roof before Petitioner was unjustly sued.

> The Respondent's attorney said, "My client had nothing to do with it. I wrote the complaint. What are you going to do? Sue me for malicious prosecution?"

The judge then stopped Capaci's attorney from further questioning, on that subject.

Besides misleading the jury, and trying to prejudice the jury against Capaci by telling them before the cross-exam began, that, "I am going to prove today, that Capaci committed FRAUD against the I.R.S." the Respondent's attorney exaggerated the

number of times Capaci did not answer "yes" or "no" in his brief to the Supreme Court of Alabama.

The Respondent's attorney also misled the Supreme Court of Alabama in his brief, which no doubt, caused the conflict between the Alabama Appellate Court and the Supreme Court of Alabama. Some of his false statements were:

1. Capaci was not credible.
2. Capaci committed fraud with the I.R.S.
3. Capaci was guilty of Contempt of Court.
4. Capaci's conduct was contumacious and willful.

Yet, there was not one bit of evidence to support the Respondent's attorney's claims. The trial judge said nothing about Capaci's conduct, ONLY THAT HE DID NOT LIKE THE WAY SHE ANSWERED QUESTIONS. Capaci tried her hardest to answer the way the judge insisted, but would get nervous and forget. However, nervousness should not mandate a dismissal with prejudice.

THE SUPREME COURT OF ALABAMA'S RULING WAS ERRONEOUS BECAUSE:

1. The Supreme Court of Alabama could not have scrutinized the record.

2. Had the Supreme Court scrutinized the record they would have found:

    a. Capaci expressed her nervousness numerous times, as she struggled to answer correctly and cautiously, but could not focus, no matter how hard she tried. It was not done on purpose; the more the judge warned her, the more nervous she got.

    b. Capaci was polite, never got angry, and was apologetic to both the judge and the attorney.

    c. Capaci was deprived of her "jury rights" and her "day in court." In Rule 41(b) F.R.C.P. a trial judge is not allowed to dismiss when there is a jury trial . . . only a non-jury.

    d. Capaci was **not cited for contempt of court**. The judge simply did not like **the way** she **responded** to the questions; but she did respond to everyone without delay or willfulness, and to the best of her ability in her nervous state.

The Supreme Court of Alabama ruled on the theory that Capaci had been cited for "contempt of

court." Although this was not true, there are constitutional limitations upon the Court's inherent power to dismiss an action for disobedience of a court order. In McCollum v. Birmingham Post Co., 259 Ala. 88, 65 So.2d 689 (1953), the Alabama Supreme Court recognized the constitutional limitations upon the Court's inherent power to dismiss an action for disobedience of a court order. The Court held that the dismissal of a libel suit, due to the plaintiff's failure to submit to a perpetuation of his testimony in collateral proceedings, was void as a denial of **due process of law** under the Alabama and U.S. Constitutions, where there had been no default by the plaintiff in the prosecution of his action. 65 So.2d at 695. Relying upon Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841 (1897), as the "leading case," the Court observed,

> Courts have no inherent power to punish contempt by denying a hearing to the contemnor, in striking his pleadings, or entering default judgement or dismissal against him, since one of the fundamental conceptions governing the court of justice is condemnation only after a hearing, and an order of this nature denying the condemnor a right, as distinguished from a favor, is void for want of due process of law in violation of the Fourteenth Amendment to the Federal Constitution or a comparable provision of the applicable state Constitution."

65 So.2d at 694 (quoting Annot., 14 A.L.R. 2d 589, 5).

The Supreme Court of Alabama relied solely on the Respondent's lawyer's false and baseless allegations, and his initial FRIVOLOUS LAWSUIT vs Andra Capaci which led to this counter-suit. All of this could have been avoided, had the Respondent's lawyer advised his client to try to remedy the mold situation, and the expensive damage it caused by offering Andra Capaci, a 9 year tenant, a solution or help, for her loss of $500,000 to $700,000 due to the mold in Respondent's property. Instead, Capaci got sued based on a LIE!!!

I. WRIT OF CERTIORARI IS TO BE GRANTED UPON REVIEW OF SUPREME COURT OF ALABAMA'S JUDGEMENT BECAUSE:

1. To say simply that there are adequate and independent state grounds to defeat federal high court review does **not** make it true.

2. The adequate and independent state ground doctrine provides **certain exceptions** to this general rule. Litigants can raise federal claims in state court, and this general rule breaks down. See following cases:

    a. Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) DUE PROCESS; Judgement; Finality.

    b. Constitutionality of statute requiring federal courts to reopen final judgements in cases **dismissed with**

prejudice pursuant to Supreme Court's decision in Lampf, Pleva v. Gilbertson, 501 U.S. 350 (1991).

II. FEDERAL DUE PROCESS ISSUES WERE PROPERLY PRESENTED IN THE STATE COURT PROCEEDINGS, IN ALL BRIEFS, AND IN THE MOTION FOR NEW TRIAL AT THE TRIAL COURT LEVEL

1. April 17, 2007 in Circuit Court of Mobile County, Alabama Civil Action . . . CV-04-2311.00 Motion for new trial and/or motion to alter, amend or vacate judgement. It was argued that the dismissal denied Capaci due process of law (C.1511). This motion was denied on April 25, 2007 (C.1617). A timely notice of appeal was filed on May 2, 2007 (C.1618).

2. October 11, 2007 in Alabama Court of Civil Appeals . . . Case 2060846 Summary Argument (see page 12).

3. October 2, 2009 in brief to Supreme Court of Alabama . . . Case 1070824 in the Application for rehearing and brief in support of (see page 11).

CONCLUSION

To the Supreme Court of America's Most Honorable Judges, their Assistants, and Anyone involved who works for Truth to Prevail and Justice to Abound, I respect and honor the work that you do, and I want to thank you in advance for considering this case for review so that other litigants who follow me will be able to enjoy their due process rights under the Constitution of the United States.

Respectfully submitted,

ANDRA CAPACI